(5)

No. 86-419

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ERNEST S. PATTON, RONALD J. MARKS, J. HARVEY BELL AND WILLIAM HARRISON,

Petitioners,

v.

GREGORY S. SOURBEER,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONERS BY THE STATE OF NEW JERSEY AND THE SIXTEEN AMICI THAT APPEAR ON INSIDE COVER

W. CARY EDWARDS
Attorney General of New Jersey

RICHARD J. HUGHES JUSTICE COMPLEX
Trenton, New Jersey 08625
(609) 292-9086
*(*Counsel of Record*)

*ALLAN J. NODES
Deputy Attorney General

MICHAEL WEINSTEIN
Deputy Attorney General

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

1987

DUANE WOODARD
Attorney General
of Colorado

CHARLES M. OBERLY
Attorney General
of Delaware

JAMES R. MURPHY
Acting Corporation Counsel
of the District of Columbia

JIM SMITH
Attorney General of Florida

JIM JONES
Attorney General of Idaho

LINLEY E. PIERSON
Attorney General of Indiana

ROBERT T. STEPHAN
Attorney General of Kansas

GEORGE W. WILSON
Secretary of Corrections
Cabinet of Kentucky

WILLIAM J. GUSTE, JR.
Attorney General
of Louisiana

HUBERT H. HUMPHREY, III
Attorney General
of Minnesota

STEPHEN E. MERRILL
Attorney General
of New Hampshire

ARLENE VIOLET
Attorney General
of Rhode Island

T. TRAVIS MEDLOCK
Attorney General
of South Carolina

W. J. MICHAEL CODY
Attorney General
of Tennessee

CHARLES G. BROWN
Attorney General
of West Virginia

A. G. MCCLINTOCK
Attorney General
of Wyoming

QUESTION PRESENTED FOR REVIEW

Whether qualified immunity under *Harlow v. Fitzgerald* may be lost in the absence of prior case law which has both a legal and factual nexus to the alleged violation of constitutional rights.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
THE COURT OF APPEALS MISAPPLIED THE "CLEARLY ESTABLISHED" RIGHT TEST OF *HARLOW V. FITZGERALD* TO ASSESS WHETHER DEFENDANTS SHOULD BE ACCORDED QUALIFIED IMMUNITY FROM LIABILITY FOR CIVIL DAMAGES	3
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Benson v. Allphin, 786 F 2d 268 (7th Cir. 1986) 6

Biagiarelli v. Sielaff, 483 F. 2d 508 (3rd Cir. 1973) 7

Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012 (1984) 2,4,5,8,11,12

Gray v. Creamer, 465 F.2d 179 (3rd Cir. 1972) . 7

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 1,3,4,5,10,12

Hewitt v. Helms, 459 U.S. 460 (1983) 4,8,9,13

Katz v. United States, 389 U.S. 347 (1967) 6

Meachum v. Fano, 427 U.S. 215 (1976), reh. den. 429 U.S. 873 (1976) 9

Mitchell v. Forsyth, ___ U.S. ___, 105 S.Ct. 2806 (1985) 6

Montanye v. Haymes, 427 U.S. 236 (1976) 9

Procunier v. Navarette, 434 U.S. 555 (1978) 6,12

Scheuer v. Rhodes, 416 U.S. 232 (1974) 10,11

Sourbeer v. Robinson, 791 F.2d 1094 (3rd Cir. 1986) 2,3,7,8,9

United States Ex Rel. Tyrrell v. Speaker, 471 F.2d 1197 (3rd Cir. 1973) 7

United States v. United States District Court, 407 U.S. 297 (1972) 7

RULES CITED:

Rule 36.4 2

Table of Authorities Continued

Page

OTHER SOURCES CITED:

42 U.S.C. sec. 1983 1,2,3,4,5

Comment, "Civil Rights: A Modification of the Qualified Immunity Defense in Actions Brought Under 42 U.S.C. sec. 1983," 24 Washburn L.J. 630 (1985) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-419

ERNEST S. PATTON, RONALD J. MARKS, J. HARVEY BELL AND WILLIAM HARRISON,

Petitioners,

VS.

GREGORY S. SOURBEER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

This case presents significant questions relating to the precise meaning of the phrase "a clearly established statutory or constitutional right" for purposes of evaluating whether a public official is entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), from liability for damages against an action brought under 42 U.S.C. sec. 1983. This Court has yet to fully articulate what constitutes a

clearly established right. The Third Circuit, in *Sourbeer v. Robinson*, 791 F.2d 2727 (3rd Cir. 1986), adopted a broad view of a clearly established right to vitiate the Pennsylvania prison officials' qualified immunity defense. This position conflicts with the more demanding standard followed by other circuits since *Harlow*. If sustained, the Third Circuit's test would gravely weaken the firmly recognized qualified immunity defense for public officials performing discretionary functions, peculiarly hampering effective independent decision-making by public officers and undoubtedly disrupting the smooth operation of government by constantly exposing officials to protracted litigation. These concerns repeatedly have been expressed by this Court in highlighting the significance of the qualified immunity defense. *Davis v. Scherer*, 468 U.S. 183 (1984).

The Third Circuit's opinion is a matter of compelling importance not just to those jurisdictions in the Third Circuit, but in the others as well, because the law is unsettled regarding how to evaluate what constitutes a clearly established right. Amici attorneys general of the respective states believe the Third Circuit has charted a misdirected course in this area of law that necessitates correction. This brief is filed on their behalf pursuant to Rule 36.4, Supreme Court Rules of Court.

SUMMARY OF ARGUMENT

Government officials performing discretionary functions are shielded from liability for civil damages in a 42 U.S.C. sec. 1983 action unless their conduct "clearly violated statutory or constitutional rights of which a reasonable person would have known." *Har-*

low v. Fitzgerald, 457 U.S. 800, 818 (1982). Although this Court has articulated a definitive rule for qualified immunity, it has not fully explained what it means by the phrase "clearly established statutory or constitutional rights."

The Third Circuit employed an extremely broad view of what constitutes a clearly established right to strip the qualified immunity shield from the prison officials in this case. The lower court's misguided standard and its application seriously undermine the sound policy considerations that underpin the qualified immunity doctrine. Moreover, the Third Circuit's analysis readily conflicts with this Court's evolving principle in section 1983 cases that public officials should not lightly be deprived of qualified immunity protection. Amici submit that the Third Circuit's opinion, if affirmed, would irreparably weaken the qualified immunity defense for public officials, hinder effective independent decision-making by public officials and disrupt the smooth operation of government, particularly the day-to-day management of prisons.

ARGUMENT

THE COURT OF APPEALS MISAPPLIED THE "CLEARLY ESTABLISHED" RIGHT TEST OF *HARLOW V. FITZGERALD* TO ASSESS WHETHER DEFENDANTS SHOULD BE ACCORDED QUALIFIED IMMUNITY FROM LIABILITY FOR CIVIL DAMAGES.

The United States Court of Appeals for the Third Circuit held that Pennsylvania's prison officials were not entitled to qualified immunity from liability for monetary damages under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *Sourbeer v. Robinson*, 791 F.2d 1094, 1103-1104 (3rd Cir. 1986). In rejecting the qualified

immunity defense, the court below embraced an extremely broad view of what constitutes an established right of which a reasonable person would have known—requiring only "some but not precise factual correspondence (with precedents) and demanding that officials apply general, well developed legal principles." *Id.* at 1103. Specifically, the circuit court referred to three cases in the early 1970's dealing with initial transfers of prisoners to administrative (segregated) custody which it said "clearly established that a liberty interest triggering due process was involved in administrative custody placements, and that procedural protections comparable to those required in *Hewitt v. Helms*, 459 U.S. 460 (1983), were required." *Id.*

The Third Circuit's open-ended test to ascertain what constitutes a clearly established right in the qualified immunity inquiry fatally conflicts with this Court's emerging principle that prior law must be virtually identical to the present case concerning the protectible interest and the scope of procedural due process at issue. Moreover, if the court of appeals' standard and the application of its standard were affirmed, a section 1983 complainant could easily vitiate the qualified immunity shield, a result that seriously would undermine the sound policy considerations detailed in *Harlow* and *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012 (1984), that support this protection.

In *Harlow*, this Court created an unmistakable objective test to define the limits of qualified immunity for officials performing discretionary functions. *Harlow v. Fitzgerald, supra*, 457 U.S. at 818-819.[1] Offi-

[1] Although *Harlow v. Fitzgerald, supra*, dealt with the avail-

cials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 818. Whether an official may prevail in his qualified immunity defense depends upon "the objective reasonableness of (his) conduct as measured by clearly established law." *Id.* No other circumstances are relevant to the issue of qualified immunity. *Davis v. Scherer, supra,* 468 U.S. at ___, 104 S.Ct. at 3018. The test is not what rights are established or not established; the test is what rights are clearly established. If the rights in question are not clearly established qualified immunity applies.

Since this Court has yet to precisely specify how to evaluate the state of the law to determine a clearly established right, *Harlow v. Fitzgerald, supra,* 457 U.S. at 818 n.32, the circuit courts and district courts painstakingly have grappled with this nettlesome question. This case affords this Court an opportunity to eliminate some of the confusion. Lower courts have created a divergence of opinion on the appropriate background of law to apply, as well as the proper time frame to consider, in deciding whether a constitutional right is clearly established. See, Petitioner's Brief for Writ of Certiorari at 29-31, and n.6, and also Comment, "Civil Rights: A Modification of the Qualified Immunity Defense in Actions Brought Un-

---

ability of qualified immunity for federal officials (senior aides and advisors to the President), this Court, for purposes of immunity law, has drawn no distinction between suits brought against state officials under 42 U.S.C. sec. 1983 and suits brought directly under the Constitution against federal officials. *Harlow v. Fitzgerald, supra,* 457 U.S. at 818 n.30.

der 42 U.S.C. sec. 1983," 24 *Washburn L.J.* 630 (1985).

This Court's recent opinions, however, firmly suggest that a very close legal and factual nexus must exist between the prior law and the right that the plaintiff alleges has been violated. In *Procunier v. Navarette*, 434 U.S. 555 (1978), this Court held that state prison officials enjoyed a qualified immunity defense to a section 1983 claim brought by an inmate alleging unconstitutional mail confiscation. *Id.* at 565. Concluding that there was no clearly established constitutional right with respect to correspondence of convicted prisoners at the time the action arose, this Court distinguished several cases that obliquely addressed the censorship of prisoner's mail and soundly rejected numerous other cases that simply did not deal with the right of convicted prisoners in their mail. *Id.* at 565-566 and n.11.

The implicit requirement of a very close connection between the existing case law and the contested action was reinforced by *Mitchell v. Forsyth*, ___ U.S. ___, 105 S.Ct. 2806 (1985). See, *Benson v. Allphin*, 786 F.2d 268, 275-276 (7th Cir. 1986). In *Mitchell*, this Court found that defendant(s) were entitled to qualified immunity because the legality of warrantless national security wiretaps which occurred in 1970 was an "open" question at that time. *Id.* at 2818-2820. Even though pre-1970 case law had established that the use of warrantless electronic surveillance generally violated the Fourth Amendment, *Katz v. United States*, 389 U.S. 347 (1967), the *Mitchell* Court focused on the much narrower question of the legitimacy of wiretapping as directed against domestic threats to national security at the time former

Attorney General Mitchell authorized the complained-of wiretap. *Id.*, 105 S.Ct. at 2819-2820. This Court's subsequent invalidation of warrantless wiretapping in cases involving national security, in *United States v.United States District Court*, 407 U.S. 297 (1972) (Keith), did not negate the fact that at the time of the disputed wiretap, the law on this subject had yet to be clearly defined. *Id.* at 2820.

Taken together, *Procunier* and *Mitchell* demonstrate that a much closer factual correspondence must exist between the action under consideration and the decisions that establish the applicable law than the "some factual correspondence" test employed by the court below. *Sourbeer v. Robinson*, *supra*, 791 F.2d at 1103. The Third Circuit erroneously relied on its own precedents, *Gray v. Creamer*, 465 F.2d 179 (3rd Cir. 1972); *United States ex. rel. Tyrrell v. Speaker*, 471 F.2d 1197 (3rd Cir. 1973), and *Biagiarelli v. Sielaff*, 483 F.2d 508 (3rd Cir. 1973), to show that the prison officers had reason to know of plaintiff's liberty interest, and his concomitant right to due process. *Id.* at 1104. These cases, however, only remotely corresponded to the allegedly impermissible actions which the Third Circuit found gave rise to a constitutional violation. As discussed instructively by the dissent below, all three cases discussed only the initial transfer of prisoners from general to segregated confinement, rather than the precise question of what standards to apply when conducting periodic reviews of custodial status or concerning when a prisoner should be released from administrative custody. *Sourbeer v. Robinson*, *supra*, 791 F.2d at 1109 (Weis, J., dissenting). Only *Tyrrell* dealt with an unsentenced prisoner as here. But that case involved disciplinary,

as compared with administrative segregation. *Id.* Nor did these cases discuss what "meaningful" process was due after the initial transfer to more restrictive confinement, the narrow question at issue in this case. See *Davis v. Scherer*, *supra*, 468 U.S. at ___, 104 S.Ct. at 3019 n.10 (officials could reasonably conclude that they had provided plaintiff with the fundamentals of due process, since the Supreme Court had yet to specify any minimally acceptable procedures for termination of civil service employment).[2]

Indeed, to the extent that there was law in April 1977 as to the federally protected interests of prisoners, it suggested that the transfer of prisoners to more restrictive confinement and their continued segregated status were matters best left to the discretion of prison administrators, or at least, that the law in this area was unsettled. The line of cases relied upon by the Third Circuit essentially extracted a prisoner's liberty interest from the due process clause of the Fourteenth Amendment. *Sourbeer v. Robinson*, *supra*, 791 F.2d at 1104. However, various pre-1977 opinions by this Court made clear that the due process clause could not be the source of an inherent constitutional right to a particular custodial status, or could not be

---

[2] Not until *Hewitt v. Helms*, 459 U.S. 460 (1983), six years after the contested actions here, did this Court indicate that Pennsylvania prison officials under their state law must engage in some type of periodic review for those inmates subject to administrative segregation. *Id.* at 477 n.9. However, this review "will not necessarily require that prison officials permit the submission of any additional evidence or statements" beyond that furnished at the time of the initial decision to confine an inmate to administrative segregation.

invoked to bar a transfer to a more restrictive custodial setting, see *Meachum v. Fano*, 427 U.S. 215, 223-227 (1976), reh. den. 429 U.S. 873 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976), thereby completely undercutting the fundamental premise upon which the early Third Circuit cases rested. The court below even acknowledged that its early cases relied on a faulty premise ultimately rejected by this Court. *Sourbeer v. Robinson, supra*, 791 *F.*2d at 1104.

Consequently, in 1977, the question whether prisoners had any protected interest under the Constitution concerning transfers to more restrictive quarters, and the level of procedural protections that might be required to vindicate those rights, was in a state of flux.[3] A reasonable prison official in Pennsylvania therefore could not clearly have known that plaintiff had a federally protected interest in confinement in the general prison population, such that as a matter of law he could not be placed in more restrictive quarters without certain procedural safeguards.[4]

---

[3] *Hewitt v. Helms, supra*, conclusively resolved that administrative confinement "was the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration," and thus did not significantly affect a prisoner's freedom to justify protection as a liberty interest under the Constitution's due process clause. *Id.*, 459 U.S. at 468.

[4] The opinion below referred to certain Pennsylvania Bureau of Corrections regulations, in effect in 1977, that established procedures and substantive guidelines governing confinement in administrative custody. *Sourbeer v. Robinson, supra*, 791 F.2d at 1097, 1105-1108. In *Hewitt v. Helms, supra*, this Court held that these regulations created a liberty interest in general population status that was protected by the Fourteenth Amendment. *Id.*, 459 U.S. at 472. However, the Pennsylvania regulations are

The Third Circuit's exceedingly broad test to define clearly established rights under *Harlow* also defeats the policy considerations—repeatedly endorsed by this Court—that underlie the qualified immunity doctrine. By framing the immunity issue in terms of objective reasonableness and the presence or absence of clearly established law, this Court has struck a delicate and careful balance between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties. *Harlow v. Fitzgerald, supra,* 457 U.S. at 814-815. The public interest requires qualified protection of government officials to protect independent decision-making. *Id.* at 807; *Scheuer v. Rhodes,* 416 U.S. 232, 241-242 (1974). The *Harlow* and *Davis* test aims to prevent insignificant claims from going to trial by allowing the immunity question to be resolved objectively as a matter of law on summary judgment. *Id.*, 457 U.S. at 818. Otherwise, officials would be unremittingly subjected to the undesirable risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action and deterrence of able people from public service. *Id.* at 816.

Equally important, where the courts have not established clear authority which controls the particular factual scenario confronting state officials at the time of their actions, they are left to their own interpretation of the applicable requirements. Under the Third Circuit approach, they would become civilly liable if

---

of no moment for purposes of this qualified immunity inquiry, since the Third Circuit's finding of clearly established law derived from its own prior interpretations of the federal due process clause in *Gray, Tyrrell* and *Biagiarelli,* rather than of Pennsylvania's statutory and regulatory law.

their interpretations turn out to be uncorrect even when they have no clear authority to inform their initial decision. Such an approach leads not only to undeserved civil liability but will ultimately lead to procrastination and inaction on the part of governmental officials. This is in direct conflict with the very purpose of this Court's limited immunity rule. As this Court has observed:

> Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all. *Scheuer v. Rhodes, supra,* 416 U.S. at 241-242.

Thus, the Third Circuit approach cannot be countenanced.

The Third Circuit's rule has other particularly objectionable consequences. It accords federal judges large discretion to comb decisional law, statutory and administrative codes for some fragile tether between the existing law and the contested action to warrant denial of qualified immunity. *Davis v. Scherer,* 468 U.S. at ___, 104 S.Ct. at 3021. Such unrestricted scrutiny needlessly would delve into assorted subjective factors, *i.e.*, a decision-maker's experiences, val-

ues and emotions, that influenced a discretionary decision. This would gravely undercut the objective test established by *Harlow*. *Harlow v. Fitzgerald, supra,* at 816-817. Inevitably, the Third Circuit's standard likely would expose public officials to liability for alleged violations of constitutional rights only peripherally related to the one at issue, including rights that were not clearly defined or even foreshadowed at the time of the disputed conduct.

The Third Circuit's rule also unduly burdens prison administrators who, unlike well-trained lawyers, cannot reasonably be expected to know the applicable case law, statutes and regulations, or understand their underlying intent. *Davis v. Scherer, supra,* 468 U.S. at ___, 104 S.Ct. at 3021 n.13. This Court in both *Harlow* and *Davis* adopted a test of "clearly established rights which a reasonable person would have known," but has refused to take into account the level of the "reasonable person," despite Justice Stevens' suggestion that it do so.[5] Prison officials, especially, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. *Id.*, 468 U.S. at ___, 104 S.Ct. at 3021. The judgment of prison officials often turns largely on purely subjective evaluations and on predictions of future be-

---

[5] Justice Stevens has suggested as follows that an appraisal of reasonableness must be judged in light of the level of the official: "Some defendants, especially those without policymaking responsibility, may establish their defense by showing that they abided by the institution's regulations or by its long-followed practices. Other officials, whose exercise of discretion is given greater deference by the courts . . . may have a correspondingly greater duty to consider the legal implications of their conduct." *Procunier v. Navarette,* 434 U.S. 555, 570 (1978) (Stevens, J., dissenting).

havior. *Hewitt v. Helms, supra,* 459 U.S. at 474. To ascribe to them the same level of knowledge as lawyers, in order to be shielded from liability for civil damages, could well hinder their independence in discretionary decision-making. Rather than devoting their undivided attention to preserving security and the internal order of their institutions, prison officials would be preoccupied with avoidance of potential liability.

CONCLUSION

For these reasons, we respectfully urge this Court to grant petitioners' certiorari petition to fully articulate the meaning of the phrase "clearly established statutory or constitutional rights" in the qualified immunity rule, and to reject the Third Circuit's misguided construction of this standard.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey

*ALLAN J. NODES
Deputy Attorney General

MICHAEL WEINSTEIN
Deputy Attorney General

**(Counsel of Record)*